

No. 44300-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

WENDY LEE TATE

Respondent/Cross-Appellant,

and

GREGORY E. TATE

Appellant/Cross-Respondent.

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APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JAMES R. ORLANDO

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. CROSS-REPLY ARGUMENT

The trial court should have awarded more than \$20,000 of the \$150,000 in attorney fees that the wife incurred in the dissolution action after it found that the husband was “intransigent [and] given the financial disparity between the parties, the wife has need and the husband is capable of making a contribution toward her attorney fees.” (Finding of Fact (FF) 2.15, CP 178) The husband claims that the wife is not entitled to any more of her fees because the trial court found the wife intransigent as well. (Cross-Response 2) That is not true. The trial court did not find the wife intransigent. (See FF 2.15, CP 178) Instead, it acknowledged that the high amount of attorney fees incurred by both parties was due in part to how “each party chose their course of action in this case.” (CP 399)

The wife’s “course of action” was to aggressively pursue a community interest in the Tate Lake property that the husband refused to acknowledge. As a result of the wife’s “course of action,” the trial court found that she had indeed established the parties’ interest in the property, because of “the countless hours working to improve, promote, and maintain the Tate Lake properties” by the community. (CP 398) As the trial court recognized, to the extent

any “fault” could be assigned to the wife in asserting her interests, the husband was “significantly more intransigent, primarily as it relates to the Tate Lake issue.” (CP 399)

In other words, the reason the wife’s attorney fees were high was because the husband resisted her attempts to establish the community’s interest in the Tate Lake properties, making it unnecessarily difficult (and expensive) to prove the interest, and forcing her to pursue orders from the court to obtain the necessary information to support her case. (See CP 505, 531, 569, 578, 598, 600, 606) “The necessity of having to unravel numerous transactions to establish community interests” justifies a greater award of attorney fees than was awarded to the wife in this case. *See Marriage of Morrow*, 53 Wn. App. 579, 591, 770 P.2d 197 (1989).

Even beyond the husband’s obstruction of the wife’s efforts to prove the community interest in the Tate Lake properties, the husband was also intransigent in filing unnecessary motions and refusing to comply with court orders. *Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992) (awards of attorney fees based upon the intransigence of one party have been granted when a party filed repeated motions which were unnecessary or simply

when one party made the trial unduly difficult and increased legal costs by his actions), *rev. denied*, 120 Wn.2d 1002, 838 P.2d 1143 (1992). For instance, the wife was forced to file a motion for contempt when the husband refused to return a boat to the wife and children as he was previously ordered. (9/18 RP 22; 9/21 RP 9-10; 9/25 RP 128; *see also* CP 35-52) The husband filed multiple unsuccessful motions for reconsideration after the trial court announced its decision. (*See* CP 75, 189, 249) The wife was also forced to file a motion to compel the husband to execute certain documents to effect the trial court's award, because he refused to comply. (CP 405) The husband's actions and inactions unnecessarily increased the wife's legal fees, which warrants a greater award of fees to the wife than granted by the trial court.

Ignoring his intransigence, the husband argues that the wife is not entitled to any more – and in fact, argues that she is entitled to *none* – of her attorney fees because the trial court acknowledged that both parties' parents have in part funded the litigation for them. (Cross-Resp. Br. 2; CP 399) But a parent's willingness to loan an adult child money to pay attorney fees is not a basis to grant or deny a request for attorney fees. In this case, the wife's mother used her personal credit cards to assist her daughter in paying her

attorney fees. (9/19 RP 55-56; 9/21 RP 6) This was not a gift, but a loan that the wife is obligated to pay back. The wife cannot even repay her mother from the fees that the wife was awarded because the husband has so far refused to pay the attorney fee judgment even though he did not stay enforcement of the decree. In any event, neither the wife nor her mother should be forced to bear the cost of litigation that was made unnecessarily expensive by the husband's intransigence.

The wife was also entitled to an award of more of her attorney fees because the trial court found that in addition to the husband being intransigent, the wife has the need for her attorney fees to be paid and the husband has the ability to pay under RCW 26.09.140. (FF 2.15, CP 178; CP 398) For the vast majority of the parties' marriage, the wife had been a stay at home parent for the parties' children, leaving her with decreased earning potential compared to the husband, who earns monthly gross income of \$9,480. (See FF 2.12, CP 177; CP 398) The husband has a far greater capacity to pay the wife's attorney fees than she does, and she should not be forced to use her limited resources to pay attorney fees that the husband unnecessarily caused.

Because the wife was entitled to attorney fees both because of the husband's intransigence and based on her need and his ability to pay, the trial court erred in awarding a little over 10% of the fees she actually incurred. This court should remand to the trial court with directions to increase the award of attorney fees to the wife.

II. CONCLUSION

This court should reverse and remand to the trial court solely to increase the attorney fee award to the wife on the grounds that the husband was intransigent and that the wife has the need and the husband has the ability to pay. This court should otherwise affirm the trial court's decision and award the wife attorney fees on appeal.

Dated this 27th day of March, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 28, 2014, I arranged for service of the foregoing Reply Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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